FAO No. 127 of 2006.

30.8.2007. Present: Mr. Romesh Verma, Advocate, for the appellant.

Mr. K.B. Khajuria, Advocate, for respondent Nos. 1, 2 (a) to 2 (f).

FAO No. 127 of 2006.

The appellants have preferred this appeal against the judgment of the learned Additional District Judge,(Fast Trace Court), Shimla remanding the case for trial court for decision afresh.

The plaintiffs' suit for permanent prohibitory injunction was dismissed by the learned Trial Court. An appeal was preferred before the learned Additional District Judge, who remanded the case to the learned Trial Court for decision afresh after holding that the learned Trial Court is in error in not deciding the objections preferred with respect to the report of the Local Commissioner. The plaintiffs had submitted before the Appellate Court that the demarcation report which had been obtained pursuant to an application having been filed under Order 26 Rule 9 of the Code of Civil Procedure; objections had been raised before the learned Trial Court but they had been left undecided. The Appellate Court, after noticing the law, held that the Trial Court was duty bound to have decided the objections on the demarcation report which had been submitted before the Trial Court and that non consideration constituted a illegality. The appeal was accordingly allowed and the case remanded to the Trial Court for decision afresh and, if necessary by allowing parties to adduce evidence.

I have heard learned counsel for the parties and have gone through the record. There is no dispute with the proposition that the objections to the report of a Local Commissioner cannot be left undecided, more especially when they constitute the substratum of the claim of any of

the parties to the suit. However, at the same time, a whole sale remand is to be avoided. The suit was not disposed of solely on the basis of the demarcation report against which objections which had been preferred. The learned appellate Court should have called for a finding by the Trial Court on this undecided question of fact and then proceeded with the appeal. An alternative course to the appellate Court was to have decided those objections on its own after giving an opportunity to both the parties to put forth their respective claims. Order 41 Rule 25 deals with a situation where the Trial Court has omitted to frame or try any issue or determining a question of fact which appears to the appellate Court essential to the right decision of the suit on merits. In such eventuality, the appellate Court would be justified in calling for a finding on the undecided fact or issue.

In these circumstances, the judgment of the learned appellate Court is modified to the extent that the suit shall remain on the file of the learned appellate Court. The case will be sent to the learned Trial Court for determination of the objections filed against the Local Commissioner's report. The appellate Court will call for this finding from the Trial court and proceed with the matter thereafter. Needless to say that the parties shall be given full opportunity to establish their respective claims. Parties to appear before the Trial Court on 31.10.2007. There shall be no order as to costs.

CMP No. 429/2006.

In view of the order passed in the main appeal, this application is disposed of.

30th August, 2007. **(Dev Darshan Sud),J.**

(cm)